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No. 82-413

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

WILLIAM F. WINTER, GOVERNOR, *et al.*,
Appellants,

v.

OWEN H. BROOKS, *et al.*,
Appellees.

On Appeal from the United States District Court for the Northern District of Mississippi

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MOTION TO DISMISS OR AFFIRM

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	i
STATEMENT OF THE CASE	2
THIS CROSS-APPEAL PRESENTS NO SUBSTANTIAL QUESTION	2
I. THE ATTORNEY GENERAL'S ADMITTEDLY VALID SECTION 5 OBJECTION TO THE STATE'S "LEAST CHANGE" PLAN BARS IMPLEMENTATION OF THAT PLAN UNLESS AND UNTIL SECTION 5 PRECLEARANCE HAS BEEN OBTAINED	3
II. THE DISTRICT COURT CORRECTLY DEFERRED TO THE ATTORNEY GENERAL'S SECTION 5 OBJECTION AND THE SECTION 5 PRECLEARANCE PROCEEDINGS IN THE DISTRICT OF COLUMBIA DISTRICT COURT	11
CONCLUSION	13

TABLE OF AUTHORITIES

Page

Berry v. *Doles*, 438 U.S. 190 (1978) 10
Burton v. *Hobbie*, Civ. No. 81-617-N (M.D. Ala., June 21, 1982) 10
Busbee v. *Smith*, Civ. No. 82-0665 (D.D.C. May 24, 1982), *stays denied*, No. A-1018 (May 25 and June 1, 1982) ..... 8, *passim*
Canady v. *Lumberton City Board of Education*, 454 U.S. 957 (1981) 12
Conor v. *Finch*, 431 U.S. 407 (1977) 2
Conor v. *Waller*, 421 U.S. 656 (1975) 6, 8
Georgia v. *United States*, 411 U.S. 526 (1973) 9
Hathorn v. *Lavorn*, —— U.S. ——, 72 L.Ed.2d 824 (1982) 4, 6
Heggins v. *City of Dallas*, 469 F. Supp. 739 (N.D. Tex. 1979) 10
Horry County v. *United States*, 449 F. Supp. 990 (D.D.C. 1978) 10
McDaniel v. *Sanchez*, 452 U.S. 130 (1981) ..... 5, *passim*
Mississippi v. *Smith*, Civ. No. 82-0956 (D.D.C.) 8
Perkins v. *Matthews*, 400 U.S. 379 (1971) ..... 6, *passim*
Seamon v. *Upham*, 536 F. Supp. 931 (E.D. Tex. 1982), *aff'd in relevant part, rev'd in part*, 71 L.Ed.2d 725 (1982) 12
South Carolina v. *Katzenbach*, 383 U.S. 301 (1966) 6
United States v. *Board of Supervisors of Warren County, Mississippi*, 429 U.S. 642 (1977) 8, 12
Upham v. *Seamon*, —— U.S. ——, 71 L.Ed.2d 725 (1982) 4
Wise v. *Lipscomb*, 437 U.S. 535 (1978) 3, 6

STATUTES:

42 U.S.C. 1973c ..... 2, *passim*
Votings Rights Act Amendments of 1982, 96 Stat. 131 6

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MOTION TO DISMISS OR AFFIRM

Appellees in the above-captioned appeal, who are the appellants in *Owen H. Brooks, et al.* v. *William F. Winter, Governor, et al.*, No. 82-233, move the Court pursuant to Sup. Ct. Rule 16 to dismiss or affirm this cross-appeal on the ground that the questions presented are so unsubstantial as not to need further argument.[1]

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[1] Appellees in this case are Owen H. Brooks, Sarah B. Johnson, Rev. Harold R. Mayberry, Willie Long, Robert E. Young, Thomas Morris, Charles McLaurin, Samuel McCray, Robert Jackson, Rev. Carl Brown, June E. Johnson, and Lee Ethel Henry, individually and on behalf of all others similarly situated.

Appellants are William F. Winter, Governor of Mississippi, William A. "Bill" Allain, Attorney General of Mississippi, Edwin Lloyd Pittman, Secretary of State of Mississippi, in their official capacities as members of the Mississippi State Board of Commissioners, and the State Board of Election Commissioners, Mississippi Democratic Executive Committee, and Mississippi Republican Executive Committee.

STATEMENT OF THE CASE

The relevant facts of this case upon which appellees rely are set forth in our Jurisdictional Statement in No. 82-233.

THIS CROSS-APPEAL PRESENTS NO SUBSTANTIAL QUESTION

In No. 82-233, Owen H. Brooks, et al., appellees here, appealed from the final judgment of a three-judge District Court ordering into effect for congressional elections in Mississippi a court-ordered congressional redistricting plan. They contend that the District Court erred as a matter of law in ordering into effect a court plan which embodies the racial redistricting policies of the State of Mississippi which were incorporated in a legislatively-enacted congressional redistricting plan (the "least change" plan) to which the United States Attorney General interposed an objection pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. They also contend that the District Court violated the court-ordered redistricting guidelines established by this Court, and most recently expressed in *Connor* v. *Finch*, 431 U.S. 407 (1977), that court-ordered plans should not be drawn in a manner which unnecessarily minimizes and dilutes black voting strength. That appeal presents substantial questions which should be resolved by this Court.

This cross-appeal by the defendants in that case, on the other hand, presents no substantial question which merits plenary consideration by this Court. The only question presented in this cross-appeal is whether Section 5 means what it says, *viz.*, that Mississippi, as a covered state, is precluded from implementing a new, legislatively-enacted congressional redistricting plan unless and until Section 5 preclearance has been obtained. Defendants concede that the Attorney General has rendered a valid Section 5 ob-

jection to the plan in question. Therefore, the District Court was correct in enjoining implementation of that plan "until it has been so precleared" (Jurisdictional Statement on Cross-Appeal, Appendix A, p. 20a).

I. THE ATTORNEY GENERAL'S ADMITTEDLY VALID SECTION 5 OBJECTION TO THE STATE'S "LEAST CHANGE" PLAN BARS IMPLEMENTATION OF THAT PLAN UNLESS AND UNTIL SECTION 5 PRECLEARANCE HAS BEEN OBTAINED.

Despite the fact that the Attorney General has determined that Mississippi's legislatively-enacted congressional redistricting plan is racially discriminatory and violative of the protections of the Voting Rights Act (J.S., No. 82-233, Appendix L), the state official defendants contend that (1) Mississippi has a "right" under the Voting Rights Act to implement the objected-to plan—despite the Attorney General's objection—pending adjudication of its preclearance lawsuit in D.C. District Court (J.S. on Cross-Appeal, p. 9); (2) that the District Court below erred as a matter of law in promulgating a court-ordered plan (*id.*, pp. 9-10); and (3) that the Attorney General's Section 5 objection does not constitute a finding of a Voting Rights Act violation which the District Court was obligated to remedy (*id.*, pp. 13-14).

None of these issues presents a substantial question, and all of them have been resolved by recent decisions of this Court.

Contrary to defendants' arguments, Mississippi clearly has no "right" to interim implementation of the Mississippi Legislature's plan unless and until Section 5 preclearance has been obtained. The circumstances presented in this cross-appeal are precisely those contemplated by this Court in *Wise* v. *Lipscomb*, 437 U.S. 535 (1978), in discussing the circumstances under which a District Court faces the "unwelcome obligation" (437 U.S. at 540) of devising a court-ordered reapportionment plan. One of

those circumstances is when the state's plan has not been precleared under Section 5 of the Voting Rights Act, and the imminence of a state election requires the District Court to devise a court-ordered plan:

> Plans imposed by court order are not subject to the requirements of § 5, [footnote omitted] but under that provision, a State or political subdivision subject to the Act may not "enact or seek to administer" any "different" voting qualification or procedure with respect to voting without either obtaining a declaratory judgment from the United States District Court for the District of Columbia that the proposed change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color" or submitting the change to the Attorney General and affording him an appropriate opportunity to object thereto. A new reapportionment plan enacted by a State, including one purportedly adopted in response to invalidation of the prior plan by a federal court, will not be considered "effective as law," *Connor* v. *Finch*, [431 U.S. 407] at 412; *Connor* v. *Waller*, 421 U.S. 656 (1975), until it has been submitted and has received clearance under § 5. Neither, in those circumstances, until clearance has been obtained, should a court address the constitutionality of the new measure. *Connor* v. *Finch*, *supra*; *Connor* v. *Waller*, *supra*. Pending such submission and clearance, if a State's electoral processes are not to be completely frustrated, federal courts will at times necessarily be drawn further into the reapportionment process and required to devise and implement their own plans.

437 U.S. at 542. These fundamental principles were reaffirmed by this Court last term in *Hathorn* v. *Lavorn*, —— U.S. ——, 72 L.Ed.2d 824, 837 (1982) (failure to obtain Section 5 preclearance "renders the change unenforceable"); and *Upham* v. *Seamon*, —— U.S. ——, 71 L.Ed.2d 725, 731 (1982) (court-ordered plan required "to cure any constitutional or statutory defect" in state's

plan); and previously in *McDaniel* v. *Sanchez*, 452 U.S. 130, 150, 153 (1981) (preclarance requirement of the Voting Rights Act is applicable to any plan submitted by a Section 5-covered jurisdiction).

In the proceedings below, the very same state officials who have filed this cross-appeal fully recognized that the "clear language" of Section 5 of the Voting Rights Act, given the Attorney General's Section 5 objection, bars any attempt to implement the Mississippi Legislature's "least change" plan (S.B. 2001):

> Affiants are not now attempting to utilize S.B. 2001 for the congressional primaries and elections in the State of Mississippi in 1982 without Section 5 preclearance. Affiants recognize and acknowledge the clear language of both Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c, and Section 3 of S.B. 2001. Therefore, affiants will not now or in the future attempt to utilize S.B. 2001 in the State of Mississippi unless and until the use of S.B. 2001 is precleared by either the Attorney General of the United States or the United States District Court for the District of Columbia . . .

Defendants' Motion to Dismiss Count One of the *Brooks* Complaint, Joint Affidavit of William F. Winter, Bill Allain, and Edwin Lloyd Pittman, pp. 3-4.

The bar to implementing any unprecleared plan is fundamental to the statutory scheme provided by Congress in enacting Section 5:

> The Voting Rights Act "implemented Congress' firm intention to rid the country of racial discrimination in voting." *Allen* v. *State Board of Elections*, 393 U.S. 544, 548 (1969). Fearing that covered jurisdictions would exercise their ingenuity to devise new and subtle forms of discrimination, Congress prohibited those jurisdictions from implementing any change in voting procedure without obtaining preclearance under § 5.

Hathorn v. *Lavorn*, *supra*, 72 L.Ed.2d at 836. Section 5 grew out of a demonstrated need to "shift the advantage of time and inertia from the perpetrators of the evil to its victims," *South Carolina* v. *Katzenbach*, 383 U.S. 301, 328 (1966). By extending the protections of Section 5 this year, Congress has determined that this need still exists.[2]

The statutory framework of Section 5 therefore creates a presumption for covered states and jurisdictions that any new voting scheme is racially discriminatory and cannot be implemented until express Section 5 approval—from the Attorney General or the D.C. District Court—has been obtained. Once a Section 5 objection has been lodged, "the normal presumption of legitimacy afforded the balances reflected in legislative plans, see *Burns*, *supra*, at 84-85, could not be indulged." *Wise* v. *Lipscomb*, *supra*, 437 U.S. at 549 (Powell, J., concurring).

The bar to implementation of unprecleared plans applies equally to Federal District Courts. The congressional mandate

> requires that whenever a covered jurisdiction submits a proposal reflecting the policy choices of the elected representatives of the people—no matter what constraints have limited the choices available to them—the preclearance requirement of the Voting Rights Act is applicable.

McDaniel v. *Sanchez*, *supra*, 452 U.S. at 153. The Mississippi District Court therefore was barred from implementing the state's legislative plan absent Section 5 preclearance. See also, *Connor* v. *Waller*, 421 U.S. 656 (1975); *Perkins* v. *Matthews*, 400 U.S. 379, 386 (1971).

Contrary to the defendants' argument (J.S. on Cross-Appeal, pp. 9-10), the order of the District Court below

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[2] Voting Rights Act Amendments of 1982, 96 Stat. 131, signed into law by President Reagan on June 29, 1982.

does not deny Mississippi its statutory remedy of a judicial determination whether S.B. 2001 complies with the Voting Rights Act. The District Court's order is by its terms temporary—S.B. 2001 is enjoined only "until it has been so precleared." J.S. on Cross-Appeal, Appendix A, p. 20a. Regardless of the Mississippi District Court's order, Mississippi remains free to pursue its lawsuit in the District of Columbia District Court seeking to overturn the Attorney General's objection.[3]

In this case, these state officials cannot complain of any delay in obtaining a prompt Section 5 determination of the validity of the legislative plan. Mississippi had an opportunity to obtain a Section 5 determination from the Justice Department as early as January, 1982, but counsel for the state persuaded Justice Department officials to seek additional information (J.S. on Cross-Appeal, p. 5), thus extending the period within which the Attorney General could object.[4] Further, when the state was offered an

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[3] The question of the validity of the District of Columbia District Court's interlocutory ruling that whether S.B. 2001 now has a discriminatory effect—the *Beer* retrogression standard—should now be determined by comparing it with the court-ordered plan, discussed in the Jurisdictional Statement on Cross-Appeal, pp. 9-10, concerns the interlocutory ruling of the D.C. District Court, and is not properly presented in this cross-appeal.

[4] In Ex. C-1, ¶ 10, p. 4, the defendants stipulated that the January 11, 1982 letter requesting additional information was written "after telephone conversations" between the Assistant Attorney General in charge of the Civil Rights Division of the Justice Department and the Joint Legislative Committee Chief Counsel, who represented the defendants below and here. Although the stipulation does not so state, it was common knowledge at the time that Mr. Leonard persuaded the Assistant Attorney General not to object at that time, but to give the state more time to make its case with the Justice Department. Defendants admit in their Jurisdictional Statement that they used this additional 60 days to "attempt[] to elucidate [the state's] position that S.B. 2001 could not be said to retrogress since it enhanced black voting strength as compared to the previously precleared 1972 plan" (p. 5).

early, expedited trial on its Section 5 preclearance lawsuit in the District Court for the District of Columbia, the early trial date was declined by counsel for the state.[5] The defendants should not be heard to complain about any delay in obtaining a final adjudication of their plan when any delays in this case are of their own making.

In essence, the defendants' argument boils down to the novel and unprecedented claim that the mere filing by the state of its Section 5 preclearance action in the District Court for the District of Columbia automatically suspends the operation of the Attorney General's Section 5 objection, grants presumptive preclearance to the legislative plan, and makes that plan available to the Mississippi District Court for use as a court-ordered redistricting plan. No court has ever issued such a ruling, and the contention is contrary to the fundamental congressional purpose and to the entire statutory structure of Section 5. In order to sustain this claim, this Court would be required to overrule *McDaniel* v. *Sanchez*, *supra*; *United States* v. *Board of Supervisors of Warren County, Mississippi*, 429 U.S. 642 (1977); *Connor* v. *Waller*, 421 U.S. 656 (1975); and *Perkins* v. *Matthews*, 400 U.S. 379 (1971), all of which hold that a local District Court is without jurisdiction to approve and order into effect a legislatively enacted redistricting plan or other voting law change which has not been precleared pursuant to Section 5.

Defendants' claim is similar to that recently advanced —unsuccessfully—by the State of Georgia in *Busbee* v. *Smith*, Civil No. 82-0665 (D.D.C. May 24, 1982). The Georgia Legislature enacted a new congressional redistricting plan, and the Attorney General objected to the plan pursuant to Section 5. Georgia filed a declaratory judgment lawsuit in the District Court for the District

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[5] Pre-Trial Conference, April 16, 1982, *Mississippi* v. *Smith*, Civil No. 82-0956 (D.D.C.), Transcript, p. 27.

of Columbia, but before any final ruling was issued, the Georgia Attorney General issued an opinion which authorized state election officials to implement the plan prior to preclearance. The District Court issued an order enjoining any implementation of the plan until the state had obtained a Section 5 declaratory judgment, Memorandum Opinion and Order of May 24, 1982, and two Justices of this Court, Chief Justice Burger and Justice Rehnquist, denied stays of the District Court's injunction. *Busbee* v. *Smith*, No. A-1018 (May 25 and June 1, 1982).

None of the cases upon which defendants rely lend any credence to their claim. In *Georgia* v. *United States*, 411 U.S. 526 (1973), this Court did not hold that Georgia had a right to use its unprecleared legislative reapportionment plan pending further Section 5 proceedings, but merely granted a stay of the District Court's decision to resolve the questions presented in the state's appeal. Contrary to defendants' assertions, once this Court held that Georgia's legislative reapportionment plan was covered by Section 5, and that the Attorney General had entered a timely objection to that plan, this Court affirmed the District Court's injunction against use of that plan, and remanded the case

> with instructions that any future elections under the Georgia House reapportionment plan be enjoined unless and until the State, pursuant to § 5 of the Voting Rights Act, tenders to the Attorney General a plan to which he does not object, or obtains a favorable declaratory judgment from the District Court for the District of Columbia.

411 U.S. at 541. In *Perkins* v. *Matthews*, 400 U.S. 379, 396-97 (1971), this Court did not hold that the authority of the District Court to enjoin voting law changes to which the Attorney General has objected is discretionary. The court merely held that when local officials attempt to

implement a change which has not been submitted for Section 5 review, "in certain circumstances" the District Court might order local officials to seek Section 5 preclearance and order "a new election only if local officials fail to do so or if the required federal approval is not forthcoming." The Court did not address the situation presented here where an objection already has been lodged.

In *Berry* v. *Doles*, 438 U.S. 190 (1978), this Court merely refused to overturn an election already held where there were questions whether the change was covered by Section 5. In the two other reported District Court decisions upon which defendants rely, the courts actually enjoined implementation of the unprecleared plans. *Horry County* v. *United States*, 449 F. Supp. 990 (D.D.C. 1978); *Heggins* v. *City of Dallas*, 469 F. Supp. 739 (N.D. Tex. 1979). *Burton* v. *Hobbie*, Civil No. 81-617-N (M.D. Ala. June 21, 1982), simply involved exceptional circumstances not present in this case.

Apart from the lack of any legal claim, Mississippi also has no equitable claim to use of this discriminatory plan pending judicial preclearance proceedings. As the Attorney General determined in his Section 5 objection letter (J.S., No. 82-233, Appendix B), Mississippi has gerrymandered its five congressional districts to dilute black voting strength since the Voting Rights Act was first enacted. This history of Mississippi's congressional redistricting efforts shows that plans enacted in 1966, 1972, and 1981 were all racially motivated to prevent black voters from electing candidates of their choice (*id.*, pp. 16-23). Although the state claims that public hearings were held on S.B. 2001, the unanimous testimony of every black witness for a majority black district was totally and completely ignored (*id.*, p. 23). The District Court's

injunction against the use of S.B. 2001, even on an interim basis, therefore was also just and equitable.

Defendants' claim that they have a right to implement their unprecleared congressional redistricting plan pending judicial preclearance proceedings would nullify the express statutory prohibitions of Section 5, is contrary to all the relevant decisions of this Court, is totally unsupported by any relevant decision, and fails to present a substantial question for plenary review by this Court.

II. THE DISTRICT COURT CORRECTLY DEFERRED TO THE ATTORNEY GENERAL'S SECTION 5 OBJECTION AND THE SECTION 5 PRECLEARANCE PROCEEDINGS IN THE DISTRICT OF COLUMBIA DISTRICT COURT.

The District Court carefully explained why it was precluded from ordering into effect S.B. 2001 on an interim basis. The court noted that when S.B. 2001 was submitted for Section 5 review, "it was specifically objected to by the Attorney General, who concluded that it violated § 5." "Insofar as this court's interim plan-making task is controlled by the Voting Rights Act, we may not substitute our judgment for that of the Attorney General. *Perkins* v. *Matthews*, 400 U.S. 379, 27 L.Ed.2d 476 (1971)." J.S. on Cross-Appeal, Appendix A, p. 10a. The court also noted that Mississippi had instituted its Section 5 preclearance lawsuit in the District Court for the District of Columbia. "It would be both inappropriate and unseemly for us to implement on a temporary basis the plan which those proceedings seek to preclear since we have other plans which will allow us to order temporary redistricting which adequately reconciles state political policy with federal statutory and constitutional standards." *Id.*

Contrary to the defendants' argument (J.S. on Cross-Appeal, pp. 13-14), the Attorney General's Section 5 objection is dispositive of the issue of Section 5 preclearance unless and until a Section 5 declaratory judgment has been obtained from the District Court for the District of Columbia. *Canady* v. *Lumberton City Board of Education*, 454 U.S. 957 (1981); *United States* v. *Board of Supervisors of Warren County, Mississippi*, 429 U.S. 652 (1977); *Seamon* v. *Upham*, 536 F. Supp. 931, 958 (E.D. Tex. 1982), *aff'd in relevant part, rev'd in part*, 71 L.Ed.2d 725 (1982). In all those cases, the Attorney General lodged a Section 5 objection, and that objection was considered determinative of a Section 5 violation absent judicial preclearance in the District of Columbia District Court. There is no authority for the state's bizarre proposition that the mere filing of a Section 5 declaratory judgment action in the District Court for the District of Columbia vitiates the Attorney General's objection. The recent action of the D.C. District Court shows clearly that it does not. *Busbee* v. *Smith*, Civil No. 82-0665 (D.D.C. May 24, 1982), *stays denied*, No. A-1018 (May 25 and June 1, 1982).

The defendants' argument that the Attorney General's Section 5 objection is not dispositive of Section 5 compliance and does not constitute a Voting Rights Act defect which the District Court was required to remedy is utterly without support and fails to present a substantial question.

CONCLUSION

For the reasons stated herein, this appeal should be either dismissed or that portion of the District Court's judgment (J.S. on Cross-Appeal, Appendix A, Order, par. 4, p. 20a) enjoining implementation of S.B. 2001 "until it has been so precleared" should be affirmed.

Respectfully submitted,

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